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Supreme Court, U.S.
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No. 09-124

IN THE
Supreme Court of the United States

CLARK A. MORRES,
Petitioner,
v.
DEER'S HEAD HOSPITAL CENTER, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 28, 2009

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QUESTIONS PRESENTED

1. Did the court of appeals properly affirm the dismissal of Count I of the petitioner's first amended complaint because there is no evidence that Congress abrogated the States' Eleventh Amendment immunity in enacting the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd?

2. Did the court of appeals properly affirm the dismissal of Count II of the petitioner's first amended complaint because Dr. Morres received the hearing to which he was entitled and the first amended complaint does not allege any other procedural defects that would constitute a denial of due process?

PARTIES TO THE PROCEEDING

The petitioner is Clark A. Morres, M.D. The respondents are Deer's Head Hospital Center, a facility operated by the Maryland Department of Health and Mental Hygiene, and Sandra K. Smith, the chief executive officer of Deer's Head Hospital Center.

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OPINIONS BELOW

The United States District Court for the District of Maryland dismissed the first amended complaint on July 25, 2008. App. 3a-12a. The United States Court of Appeals for the Fourth Circuit affirmed that judgment in an unreported, per curiam decision on May 4, 2009. App. 1a-2a.

STATEMENT OF THE CASE

Deer's Head is a state-owned and operated chronic hospital and nursing home in Salisbury, Maryland. R. App. 7. Ms. Smith is the chief executive officer of Deer's Head. *Id.* Deer's Head provides rehabilitation services, tuberculosis treatment, medical management for chronically ill patients, nursing home care, and kidney dialysis. *Id.*; www.dhmh.state.md.us/deershead/patientsrvc.

Dr. Morres became Deer's Head's medical director in July 2005 and was terminated from that position on February 13, 2006. R. App. 5, 9. Dr. Morres alleged that he was terminated in retaliation for his complaints about noncompliance with the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd, and because of the fear that he would report the alleged EMTALA violations and other unlawful activities to the proper authorities. R. App. 9.

Dr. Morres also claimed that Deer's Head and Ms. Smith deprived him of a liberty interest in his employment by creating "the false negative impression or appearance" that he "had been discharged for cause" and by disclosing "unfounded, negative comments placed . . . in his evaluations" to unnamed persons in the community. R. App. 10. Allegedly, he was not able to obtain other employment in Maryland and was

forced to move to the West Coast. *Id.*

Dr. Morres requested a hearing to challenge his termination on the ground that it was illegal. R. App. 1-5.. In the administrative challenge, Dr. Morres requested rescission of his termination in exchange for a letter of resignation and removal of "[a]ll record of adverse employment" from his records. R. App. 1. Although he alleged in his administrative challenge that he had been terminated because of his complaints about and refusal to participate in a variety of illegal acts, Dr. Morres "conceded that he had not filed any formal complaints with the appropriate regulatory authorities regarding the alleged illegal and unethical acts occurring at" Deer's Head. R. App. 3.

The Office of Human Resources of the Maryland Department of Health and Mental Hygiene (the "Department") denied Dr. Morres' challenge. R. App. 4-5. The decision noted that Dr. Morres had failed to show that he had filed a complaint outside the Department or that Ms. Smith knew about his allegations of improper activities. R. App. 4. "To the contrary, Management successfully argued its position that Dr. Morres was terminated because of his unsatisfactory work performance." *Id.*

Dr. Morres then filed suit against Deer's Head and Ms. Smith solely for violation of EMTALA. Deer's Head and Ms. Smith moved to dismiss. Before the district court ruled on their motion, Dr. Morres filed the first amended complaint and added the claim that Ms. Smith deprived him of his liberty interest under the Fourteenth Amendment's Due Process Clause. R. App. 6-12. Deer's Head and Ms. Smith again moved to dismiss.

The district court granted the motion to dismiss. It rejected Dr. Morres' argument that EMTALA abrogated the State's immunity. The court recognized

that Congress enacted EMTALA pursuant to its Article I powers, not its power to enforce the Fourteenth Amendment. App. 9a. Thus, the court applied well-settled law to conclude that EMTALA did not abrogate states' immunity from suit under the Eleventh Amendment. App. 7a-9a.

The court also dismissed Dr. Morres' claim that Ms. Smith deprived him of his liberty interest under the Fourteenth Amendment's Due Process Clause. As the court recognized, App. 11a, "the constitutional harm 'is not the defamation' itself; rather it is 'the denial of a hearing at which the dismissed employee has an opportunity to refute the public charge.'" *Sciolino v. City of Newport News*, 480 F.3d 642, 649 (4th Cir. 2007) (quoting *Cox v. N. Va. Transp. Comm'n*, 551 F.2d 555, 558 (4th Cir. 1976)). Because the State of Maryland gave him a hearing, Dr. Morres received the process that was due. Therefore, he did not state a claim upon which relief could be granted. App. 12a.

REASONS FOR DENYING THE WRIT

THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The unpublished decisions below conform with prior decisions of this Court and involve no error that would justify the exercise of this Court's discretionary jurisdiction. Dr. Morres simply repeats the arguments that he made to the lower courts without making any effort to identify conflicts with the decisions of any other federal court of appeals. *See* Sup. Ct. R. 10(a). In fact, he does not even cite a case from any appellate court other than the Fourth Circuit.

Dr. Morres also does not, and cannot, claim that the circuit court's brief unreported opinion determined an important question of federal law that this Court either has not previously decided or has previously

decided in a conflicting way. *See* Sup. Ct. R. 10(c). On the contrary, the district court properly applied well-established law in dismissing Dr. Morres' first amended complaint, as the court of appeals subsequently affirmed.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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201 W. Preston Street • Baltimore, MD 21201
Robert L. Ehrlich, Jr., Governor
Michael S. Steele, Lt. Governor
S. Anthony McCann, Secretary

DECISION
APPEAL OF DISCIPLINARY ACTION

APPELLANT: Dr. Clark A. Morres
DHMH CASE #: 06-DH-161
CLASS: Physician Program Manager III
DATE OF CONFER: September13, 2006
UNIT: Deer's Head Hospital Center
DATE OF ANSWER: November 28, 2006
EMPL REP: Robin R. Cockey, Esq.
MGT REP: Michael Dollinger, Personnel
DATE FILED: February 13, 2006
EMPL REL OFCR: Michael H. Huggins

ISSUE OF APPEAL:

Whether the employee's termination from his position in management service was illegal or unconstitutional.

REQUESTED REMEDY:

"1. Assurance of compensation for all compensatory time earned from July 11, 2005 through Feb 13, 2006. 2. Rescind extension of probationary period and rescind termination on probation in exchange for written letter of resignation. 3. All record of reference to adverse employment be removed from records."

STATEMENT OF FACTS:

1. Dr. Clark A. Morres was hired as a Physician Program Manager III at Deer's Head Hospital Center ("DHHC") on July 11, 2005. Dr. Morres served as the Medical Director for the facility, reporting to the Chief Executive Officer, Sandra K. Smith.

2. During his tenure as a management service employee at DHHC, Dr. Morres received a 90- day performance evaluation (rendered in mid-December 2005), which noted several essential functions and behavioral elements that were in need of improvement. A 6-month (overall) performance evaluation was rendered in January 2006, showing improvement in some areas but lingering deficiencies specifically in the areas of communication, staff development, and leadership skills.

3. Dr. Morres was placed on an extended probation on January 11, 2006 to allow additional time to further evaluate his performance as Medical Director.

4. When his performance did not improve to standards established by his supervisor, Dr. Morres was given notice of his termination by the Chief Executive Officer on February 13, 2006. He was paid through February 24, 2006, as required by law.

DISCUSSION:

Michael Dollinger, Personnel Administrator and Sandra K. Smith, Chief Executive Officer attended the conference on behalf of Management. Dr. Clark A. Morres was present and represented by Robin R. Cockey, Esq. This officer was also present to confer with the parties.

The conference commenced with an explanation to all

parties that in order for the employee to prevail in his appeal of the termination from a management service position, the employee must prove that the termination action taken by Management was either illegal or unconstitutional.

Dr. Morres alleged that his termination of employment was triggered by his complaints about and refusal to participate in Medicare fraud, violations of Emergency Medical Treatment and Active Labor Act ("EMTALA"), misuse of his controlled substance registration certificate, and violations of standards set by the Joint Commission on Accreditation of Hospital Organizations ("JCAHO"). Dr. Morres recalled that he had raised his concerns with different DHHC administrators, but they were "more interested in maintaining the census" than taking corrective actions. Dr. Morres conceded that he had not filed any formal complaints with the appropriate regulatory authorities regarding the alleged illegal and unethical acts occurring at DHHC during his tenure as an employee or after his termination, citing his intention to be a team player and agent of change rather than a "trouble-maker." Dr. Morres described the work environment as having an ongoing under-current of negativity as the Chief Executive Officer attempted to exert control over medical decisions that she was not qualified to make.

Management denied the allegations made by Dr. Morres regarding Medicare fraud, JCAHO violations, and misuse of his controlled substance registration certificate. Management also argued that Dr. Morres never mentioned the alleged EMTALA violations to his supervisor at any time prior to his termination. Management testified that Ms. Smith provided informal counseling and ongoing feedback to Dr. Morres regarding his performance throughout his tenure at DHHC. Management cited concerns that Dr.

Morres was unreceptive to constructive criticism, demonstrated poor communication skills with internal staff and external business partners, and failed to assume a true leadership role with the medical staff to achieve positive patient outcomes. In essence, after approximately six (6) months of employment, Management determined that Dr. Morres was not performing satisfactorily in the Medical Director position for which he was hired.

DECISION:

In an appeal of a termination from a management service position, the burden of proof is on the employee, who must prove that Management's action was either illegal or unconstitutional. In this case, Management's action was neither illegal nor unconstitutional.

In order to prevail in his appeal on the grounds that the termination of employment was a retaliatory action taken by Management, Dr. Morres needed to establish a prima facie case that, at minimum, he filed a whistleblower or other formal complaint outside of DHMH and that his supervisor was aware of his allegations regarding improper practices taking place at DHHC. No evidence was presented by Dr. Morres to prove that either of these events occurred and that Management retaliated against him for complaining about alleged improprieties. To the contrary, Management successfully argued its position that Dr. Morres was terminated because of his unsatisfactory work performance. Furthermore, he served at the pleasure of his appointing authority, and his employment was terminated in accordance with Annotated Code of Maryland, State Personnel and Pensions §11-305.

I am not persuaded to grant the appellant's requested

remedy that the termination of employment be rescinded in exchange for a letter of resignation and that all adverse employment information be removed from his file. With regard to the claim for payment of compensatory time earned, I find that Dr. Morres was entitled to and compensated for two (2) earned and unused compensatory leave days upon separation from State service, per Annotated Code of Maryland, State Personnel and Pensions §9-901.

Pursuant to Annotated Code of Maryland, State Personnel and Pensions §11-113, the decision of the head of the principal unit is the final administrative decision in an appeal of a disciplinary action taken against an employee in management service. As I find no evidence that Dr. Morres' termination of employment was illegal or unconstitutional, his appeal in DHMH Case #06-DH-161 is hereby denied and dismissed.

/s/
Janet S. Nugent
Director
Office of Human Resources

/s/
Michelle H. Huggins, PHR
Employee Relations Officer
Employee Relations Division

cc:
Dr. Clark A. Morres
Robin R. Cockey, Esq.
Michael Dollinger, DHHC Personnel Administrator
Sandra K. Smith, DHHC Chief Executive Officer

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CLARK A. MORRES, M.D.
29818 Deer Harbor Drive
Salisbury, MD 21804 Case No. _____

Plaintiff

v.

DEER'S HEAD HOSPITAL CENTER
351 Deer's Head Hospital Road
Salisbury, Maryland 21802

SANDRA SMITH
Individually, and in her Official Capacity
c/o Deer's Head Hospital
351 Deer's Head Hospital Road
Salisbury, Maryland 21802

Defendants

* * * * * * * * *

FIRST AMENDED COMPLAINT

PREAMBLE

This First Amended Complaint is added for the purpose of clarifying the Plaintiff's allegations and the legal theories upon which he relies in seeking relief. It is intended to relate back to the time of the filing of his original Complaint. Plaintiff does not abandon or waive any of the claims or causes of action asserted in his original Complaint.

COMES NOW, Plaintiff, Clarke A. Morres, M.D. ("Dr. Morres"), through counsel files this Complaint against his former employer, Deer's Head Hospital Center ("Deer's Head") and Sandra Smith ("Ms.

Smith"), asserting claims for violations of the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 USC § 1395dd. Dr. Morres contends Defendants committed such violations by terminating him in retaliation for his attempts to bring Deer's Head into compliance with EMTALA.

VENUE AND JURISDICTION

1. This case is a civil action arising under the laws of the United States. Accordingly, this Court has jurisdiction pursuant to 28 USC § 1331.

2. The events giving rise to Plaintiff's claims occurred in Maryland. Deer's Head maintains its administrative office in Maryland and there is no district where this claim may otherwise be brought. Accordingly, venue lies in this Court, pursuant to 28 § 1391(b).

PARTIES

3. Dr. Morres is a resident of King County, in the State of Washington.

4. Deer's Head is a hospital located in the State of Maryland which provides rehabilitation and chronic care, as well as skilled and long term care services.

5. Ms. Smith, at all relevant times was the Director of Deer's Head.

FACTS COMMON TO ALL COUNTS

6. Dr. Morres was hired by Deer's Head in April 2005, and officially began his employment as Medical Director in July 2005.

7. Shortly into Dr. Morres' employment with Deer's Head, Dr. Morres discovered facts which led him reasonably to conclude that patients at Peninsula Regional Medical Center, (PRMC), a local hospital, were being transferred to Deer's Head when their

insurance benefits would no longer pay for their continued stay at PRMC, but prior to patients being fully stabilized.

8. Although Dr. Morres objected, he believes and therefore alleges Ms. Smith directed patients be regularly accepted from PRMC even though they were not sufficiently stabilized to be transferred to the lower level of care available at Deer's Head, i.e. blood or blood product transfusions like platelets had not been done, or results of key diagnostics, results of key diagnostics, such as biopsies, were not known prior to transfer.

9. In one instance, Dr. Morres discovered facts which led him reasonably to conclude Ms. Smith overrode Dr. Morres' medical decision, and accepted a patient who needed platelet transfusions not available at Deer's Head. The patient had to be returned to PRMC days later, where the patient died.

10. Dr. Morres has reasonably determined that these situations exemplify a pattern of patient transfers in which Deer's Head accepted PRMC patients who were not sufficiently stabilized, but whose acute hospital care insurance benefits had expired. It is Dr. Morres' objectively reasonable belief that since Deer's Head could begin using up the patient's chronic hospital care benefits, the patients were sent to Deer's Head. If confirmed, the above-described conduct violated Deer's Head's responsibility to report transfers of patients who were unstable, to evaluate a proposed transfer appropriately, and to refuse unstable patients.

11. Dr. Morres repeatedly complained to Ms. Smith, a nurse by training, of these seemingly improper medical decisions regarding transfers. Dr. Morres believes Ms. Smith, although medically qualified to do so, overrode his medical judgment, wrongfully and to the detriment of many patients.

12. Dr. Morres believes his complaints about the above-described violations caused Ms. Smith to

retaliate against him via a series of untimely, pretextual performance evaluations.

13. Dr. Morres protested what he believed to be Ms. Smith's false and contrived remarks on his evaluations, and, in further protest of the ongoing improper activities of Deer's Head and Ms. Smith, Dr. Morres attempted to step down from the position of Medical Director. On February 7, 2006, he approached the personnel department of Deer's Head to request a voluntary demotion.

14. Dr. Morres' demotion was denied, and in fact, he was terminated approximately one week later on February 13, 2006. Dr. Morres' termination was allegedly based on Ms. Smith's pretextual performance evaluations, although the termination was in actuality a product of his complaints of noncompliance, and Dr. Morres believes also a product of the fear that he would alert the proper authorities of the ongoing violations of EMTALA, and other unlawful activities, committed by Ms. Smith and Deer's Head.

CAUSE OF ACTION

COUNT I: EMTALA

15. The facts alleged above are incorporated by reference.

16. Defendants' acts as alleged above constitute violations of EMTALA, and caused Dr. Morres to suffer personal harm as a direct result thereof.

COUNT II: DEPRIVATION OF LIBERTY INTEREST UNDER THE DUE PROCESS CLAUSE TO THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

21. The facts alleged above are incorporated by reference.

22. Through their acts and statements, within Deers Head and externally, Defendants unfairly and without factual or equitable basis gave rise to the appearance and impression Plaintiff had been guilty of misconduct, incompetence, poor performance and/or negligence, and created the false negative impression or appearance Plaintiff had been discharged for cause. Ms. Smith, for example, had Plaintiff ostentatiously escorted off premises by security, when he was terminated. Shortly thereafter, he discovered that unfounded, negative comments placed by Ms. Smith in his evaluations were circulating throughout the community, having apparently been disclosed by her or at her direction. As a consequence, Plaintiff found himself unfairly stigmatized within his profession, and hence unable to find suitable reemployment in the community. Plaintiff was compelled to seek such reemployment on the West Coast, far from his home and the region within he had lived his entire life.

23. As a direct and proximate result of Defendants' misconduct, Plaintiff was damaged in his reputation, character and standing in the community, suffered severe emotional distress accompanied by physical symptoms, and incurred and will continue to incur economic losses in the form of lost or reduced wages, job benefits and the like. Defendants have thus wrongfully deprived Plaintiff of a liberty interest in his employment, secured to him under the Due Process Clause of the Fourteenth Amendment of the United States of America.

CLAIMS FOR RELIEF

As relief for his claim asserted above Plaintiff prays the following relief:

Compensatory Damages
(Dr. Morres v. All Defendants)

1. Enter a judgment in favor of Plaintiff against Defendants, jointly and severally for compensatory damages.

Punitive Damages
(Dr. Morres v. All Defendants)

2. Enter a judgment in favor of Plaintiff against Defendants, jointly and severally for punitive damages.

Injunctive, Declarative and Equitable Relief
(Dr. Morres v. All Defendants)

3. Issue an order reinstating Dr. Morres to his medical director position at Deer's Head, and awarding corollary injunctive relief, including, but not limited to, front pay.

4. Enter a declaratory judgment pronouncing Defendants to have violated Plaintiff's rights under the Emergency Medical Treatment and Active Labor Act.

5. Issue an order directing that all adverse prejudicial defamatory material be purged from Dr. Morres' employment file.

Attorney's Fee and Costs
(Dr. Morres v. All Defendants)

6. Assess reasonable attorney's fees and costs of suit against Defendants, jointly and severally.

Other Relief
(Dr. Morres v. All Defendants)

7. Grant Plaintiff such other and further

relief as the nature of his cause should warrant.

/s/
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